

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

IN RE WASHINGTON MUTUAL
MORTGAGE BACKED SECURITIES
LITIGATION,

This Document Relates to: ALL CASES

Master Case No. C09-037 MJP

[Consolidated with: Case Nos.
CV09-0134 MJP, CV09-0137 MJP, and
CV09-01557 MJP]

**DEFENDANTS' MOTION TO AMEND
SCHEDULING ORDER**

**NOTE ON MOTION CALENDAR:
AUGUST 5, 2011**

I. INTRODUCTION

This Court's October 29, 2010, Scheduling Order (Dkt. No. 207, the "Scheduling Order") sets July 29, 2011, as the deadline for "substantial completion" of document production. Defendants WaMu Capital Corporation ("WCC") and WaMu Asset Acceptance Corp. ("WAAC") and third party JPMorgan Chase Bank, N.A. ("JPMorgan")¹ have worked diligently to comply with that deadline. As of July 29, WCC (which maintains documents responsive to Plaintiffs' document requests) and JPMorgan will have produced over 1.7 million documents, constituting over 12 million pages. Those productions have been made following extensive efforts by WCC and JPMorgan to search and review WCC's and Washington Mutual Bank's ("WMB") documents, including conducting electronic searches of terabytes of information, reviewing documents responsive to Plaintiffs' document requests over thousands of hours, screening the documents for privilege, and processing the responsive documents for production.

As a result of their efforts, WCC and JPMorgan identified and have begun processing and reviewing a sizeable amount of additional documents. WCC expects to produce an additional 55,000 documents by the middle of August—and it is continuing its efforts to search for, review and produce perhaps thousands of additional documents. JPMorgan likewise is continuing to produce documents. Although WCC and JPMorgan cannot estimate the yield from these ongoing efforts, given the volume of documents that must be reviewed, it

¹ In compliance with the Court's October 29, 2010 Scheduling Order which requires the parties to "work jointly with JPMorgan to obtain the documents Plaintiffs seek from J.P. Morgan" (10/29/10 Scheduling Order at 2), Defendants have been in close contact with counsel for JPMorgan to understand the status of its document production. Those discussions form the basis for Defendants' description of JPMorgan's production contained herein. (See Declaration of John D. Pernick in Support of Defs.' Mot. to Amend Scheduling Order, dated July 28, 2011 ("Pernick Decl.") ¶ 4.)

1 is fair to say that Defendants and JPMorgan will not be “substantially complete” with
 2 document production by July 29, 2011. Accordingly, pursuant to Rule 16 of the Federal
 3 Rules of Civil Procedure, Defendants respectfully request that the Scheduling Order be
 4 amended to extend by sixty days the date for document production to be “substantially
 5 complete” and that certain other changes to the Scheduling Order be made to adjust for that
 6 change. By this motion, Defendants are *not* seeking to extend the existing scheduled dates for
 7 dispositive motions or the September 17, 2012 trial date.
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9 **II. GOOD CAUSE EXISTS FOR AMENDMENT OF THE SCHEDULING ORDER**

10 A scheduling order may be modified only “for good cause”, Fed. R. Civ. P. 16(b)(4),
 11 “if it cannot reasonably be met despite the diligence of the party seeking the extension”, Fed.
 12 R. Civ. P. 16 advisory committee’s notes (1983 amendment). “In general, if the party seeking
 13 relief can show that the deadlines cannot reasonably be met despite the party’s diligence,
 14 relief may be given.” Wright, Miller & Kane, *Federal Practice & Procedure* § 1522.2 (3d ed.
 15 2011).
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17 Here, Plaintiffs requested documents relating to two primary issues: (a) the
 18 origination of loans underlying the residential mortgage-backed securities (“RMBS”) at issue
 19 in this action, which are primarily in JPMorgan’s custody; and (b) the process under which
 20 those loans were securitized and the RMBS were issued, which are primarily in WCC’s
 21 custody.
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23 The loans underlying the RMBS at issue were originated and initially serviced by
 24 Washington Mutual Bank (“WMB”). (Declaration of John D. Pernick In Support of Defs.’
 25 Mot. to Amend Scheduling Order, dated July 28, 2011 (“Pernick Decl.”) ¶ 2.) Documents
 26 relating to WMB’s loan origination business and to the origination and servicing of the loans
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1 at issue here are in JPMorgan's custody. (*Id.*) Those documents generally fall into four
2 categories: (a) the origination files for the more than 14,000 loans underlying the RMBS at
3 issue; (b) custodial documents (email and other records) of a group of 59 custodians whose
4 data JPMorgan agreed to review and produce; (c) electronic records concerning the servicing
5 of the loans (*e.g.*, notes of communications with borrowers regarding delinquencies, defaults,
6 other and issues); and (d) documents JPMorgan previously produced in response to subpoenas
7 from the Senate Permanent Subcommittee on Investigations (the "PSI"). (*Id.*) JPMorgan has
8 already produced over 1.5 million documents which total over 9 million pages, including its
9 production to the PSI and custodial documents. (Pernick Decl. ¶ 3.) By July 29, JPMorgan
10 will have also produced over 75,000 documents totaling over 1 million pages in loan
11 origination files. (*Id.*)

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14 Despite having produced a substantial number of documents, JPMorgan will not have
15 "substantially completed" document production by July 29. JPMorgan expects to complete
16 production of the custodians' data in two weeks (*i.e.*, by August 12, 2011). (Pernick Decl. ¶
17 4.) And although a large number of loan files will have been produced by July 29, 2011, that
18 production will not be "substantially complete" for at least several more weeks. Among other
19 things, although JPMorgan located electronic copies of documents for every origination file
20 for every loan at issue, it is also searching for hard copies of those files in an abundance of
21 caution. (*Id.*) In addition, JPMorgan is in the process of completing its search of the loan
22 servicing system, and archives of information from that system, for servicing information
23 related to the loans underlying the RMBS at issue. (*Id.*) This effort requires the assistance of
24 third-party vendors, and JPMorgan hopes to substantially complete that effort by the end of
25 September. (*Id.*)

1 Documents relating to the securitization process are in WCC's custody. (Pernick
2 Decl. ¶ 5.) WCC has also already produced a large number of documents. WCC completed
3 production of: (a) the offering documents relating to the securitizations, including, among
4 other things, the Pooling and Servicing Agreements, the Mortgage Loan Purchase Agreements
5 and the "loan tapes" (that provide detailed information about the loans in the securitization)
6 on January 12, 2011; and (b) trading information about the RMBS at issue here on March 1,
7 2011. (*Id.*) In addition, WCC searched its entire email archive (more than 30 million
8 messages and 1 terabyte of compressed data) for communications and other documents
9 relating to the offerings at issue. (Pernick Decl. ¶ 6.) The collection and review of those
10 documents identified 115,000 likely responsive documents. (*Id.*) Approximately 60,000 of
11 those documents, totaling well over 3 million pages, will have been produced by July 29,
12 2011. (*Id.*) The completion of the review (including privilege review) and production of
13 responsive documents from the WCC email archive is expected to be substantially completed
14 by August 12, 2011. (*Id.*)

15 WCC has identified an additional data set that may include responsive documents—
16 data from its prior "shared drives" that contain documents WCC employees stored on WCC's
17 servers. (Pernick Decl. ¶ 7.) WCC reviewed this "shared drive" data to ensure that all
18 sources of potentially responsive documents were identified. During that process, WCC
19 identified at least an additional half a terabyte of data that had been located in folders on its
20 file servers that must be reviewed for responsiveness. (*Id.*) That data is now undergoing
21 processing, review and procedures for production. WCC anticipates completing that review
22 and production by the end of September. (*Id.*)

Both WCC and JPMorgan have thus been working diligently to locate, review and produce documents responsive to Plaintiffs' document requests. WCC and JPMorgan, however, request an extension of the July 29, 2011, deadline based on the substantial number of potentially responsive documents for each of JPMorgan and WCC. Given the nearly complete absence of former WCC employees knowledgeable about the location and nature of WCC's documents, locating potentially responsive documents (electronic and otherwise), loading those documents for review, reviewing the documents (for responsiveness and privilege) and producing those documents has been simply more difficult and taken longer than expected. (Pernick Decl. ¶ 8.) The time required to produce WMB documents is further impacted by the fact that JPMorgan, which is now the custodian of those documents as a result of its having acquired certain WMB assets from the FDIC, had no prior involvement in WMB's business, as well as by the fact that virtually all of the WMB employees who were involved in the creation of potentially responsive documents have long since departed. (*Id.*) In addition, locating information relating to the origination of the over 14,000 loans in the six offerings at issue—as well as the securitization of those loans—has required collecting documents from various repositories—electronic and otherwise. (*Id.*) Despite WCC's and JPMorgan's efforts, they will need an additional two months to “substantially complete” production. (*Id.*)

Accordingly, as set forth in the proposed amended scheduled attached as Appendix A, Defendants propose a sixty day extension to the deadline for document production to be “substantially complete” (*i.e.*, September 30, 2011), and that the fact discovery cutoff be extended from December 1, 2011, to January 17, 2012. In addition, Defendants propose that the expert discovery schedule set forth in the Scheduling Order be modified to accommodate

1 the newly proposed fact discovery deadlines. Defendants do not request any change in the
2 schedule for summary judgment motions or trial—and do not believe that the changes
3 requested by this motion should have any impact on the currently-scheduled trial date.
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5 **III. CONCLUSION**

6 For the foregoing reasons, Defendants respectfully request that the Court amend the
7 October 29, 2010 Scheduling Order to extend the deadline for document production to be
8 “substantially complete” to September 30, 2011, for the Close of Fact Discovery to January
9 17, 2012, and to make additional corresponding changes as proposed in Appendix A attached
10 hereto.
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1 DATED this 28th day of July, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of July, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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